No. 10-702

Supreme Court, U S
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In The

Supreme Court of the United States

RICHARD MUNOZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

REPLY TO THE SOLICITOR GENERAL'S RESPONSE AND OPPOSITION

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INTRODUCTION

The Solicitor General (hereinafter SG) responds arguing that the Sixth Circuit cited the correct standard of review for ineffective assistance of counsel (hereinafter IAC) claims, i.e. de novo review of the application of the law to the facts. Response, 9-11. The SG also argues that if the Sixth Circuit did incorrectly state the standard of review in *Munoz*, it created, at most, an intra-circuit conflict which can be resolved by the Sixth Circuit. Response, 13. Finally, the SG argues in support of the "fact-bound" judgement of the Sixth Circuit that trial counsel's representation was constitutionally adequate. Response, 11-12. None of these claims have merit and certiorari should be granted by this Court to resolve the growing disarray among the circuits on the proper standard of review for IAC claims made in a motion for new trial pursuant to Rule 33.

The Sixth Circuit did *not* accurately recite this Court's bifurcated standard of review for IAC claims. Rather, in *U.S. v. Munoz*, 605 F.3d 359 (6th Cir. 2010), the Sixth Circuit stated only one half of the standard, i.e. the de novo standard for the review of the application of the law to the facts. *Munoz*, at 366-7. The *Munoz* Court completely omitted the other half of the standard requiring deference to district court findings which are reviewed under "the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)." *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052 (1984).

Nor is it prudent to follow the government's suggestion and turn a blind eye on this error. Response, 13. *U.S. v. Munoz* is a published case which has precedential value in the Sixth Circuit and lends support for any other court of appeals with a desire or tendency to pay "no deference" to the district court. So too it is inadequate to leave it to the circuit courts to correct the error since they have already failed to resolve the conflict.

Finally, continuing research shows an even greater disarray among the circuits than a single, defined conflict. While some courts use the "abuse of discretion" standard of review for IAC claims brought within a Rule 33 motion for new trial; other courts use the bifurcated standard of review announced in *Strickland*; still others have fashioned the "*Strickland* light" standard of review to take into account the additional deference owed the judge presiding over the trial as well as the hearing on IAC; and, finally, there are those courts (including the Sixth Circuit in *Munoz*) which hold that "no deference" is owed to the district court.

To assure the uniform and consistent application of the law, this Court must intervene to reiterate and clarify the standard of review to be applied when IAC is raised in the context of a Rule 33 motion for new trial. Such intervention is critical since the standard of review selected by the court of appeals is often outcome-determinative. Knibb, *Federal Court of Appeals Manual* § 31:1 (5th Ed. 2007, Thomson-West). Therefore, it is imperative that the courts

of appeals throughout the country apply one and the same standard of review.

ARGUMENT

I. *MUNOZ* INCORRECTLY STATES THE STANDARD OF REVIEW FOR IAC CLAIMS.

The SG claims that the Sixth Circuit in *Munoz* (as well as the Fourth Circuit in *Matthews v. Evatt*, 105 F.3d 907 (4th Cir.) *cert. denied,* 522 U.S. 833 (1997) and *U.S. v. DeTemple*, 162 F.3d 279 (4th Cir. 1998)) stated and utilized the correct standard of review, noting that *Munoz* held it owed "no deference to the district court's application of the *Strickland* ineffective assistance standard to the facts of this case." Response, 10-11, citing App. 13. The full quote from the Sixth Circuit's decision does not, however, correct the *Munoz* Court's failure to include the clearly erroneous standard of review for factual findings.

Strickland created a two-step approach in reviewing IAC claims: 1) review of facts for clear error; and, 2) review of the application of law de novo. See, Pet. For Cert., at 16, 20-25; *Strickland,* at 698. *Munoz* only recited half of that two-step standard of review. Moreover, the court below went a step beyond failing to state the second half of the bifurcated standard of review: It held that it owed "no deference" to the district court, turning *Strickland* on its head.

That the Sixth Circuit's failure to state the full and complete standard of review led to erroneous rulings is demonstrated by the complete absence of the terms "clear error" or "clearly erroneous" anywhere in the court's decision. See, Pet. App. 36-51. Rather, the Sixth Circuit reversed the factual findings (including credibility findings) because it "disagreed." See, e.g., Pet. App. at 41, 43, 49.

II. THE SIXTH AND FOURTH CIRCUITS HAVE REFUSED TO RECONCILE THE CONFLICTING CASES WITHIN THEIR CIRCUITS, LEAVING IN TACT PUBLISHED PRECEDENT HOLDING THAT THE DISTRICT COURTS ARE OWED NO DEFERENCE BY COURTS OF APPEALS REVIEWING IAC CLAIMS.

The SG argues that, at most, *Munoz's* misstatement of the standard of review creates an intra-circuit conflict which should be left to the Sixth Circuit to resolve. Response, 13. However, *Munoz* is not an unpublished decision which might pass unnoticed by other courts. Rather, it is a published decision which is already being cited and applied by other courts and commentators.[1]

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[1] According to a LexisNexis Shepard's search, Munoz has been cited by ten cases: seven district court cases and three circuit court cases, as well as three treatises on issues not in contention in this petition

Moreover, as the SG pointed out, Mr. Munoz petitioned for rehearing and rehearing *en banc* arguing that *Munoz* conflicted with other Sixth Circuit precedent correctly stating the bifurcated standard of review and giving due deference to the district court. Response, 11. The Sixth Circuit summarily denied the petition refusing to take the opportunity to resolve the conflict and correct the error in *Munoz*. Pet. App. 77.

Similarly, the Fourth Circuit has failed to correct the holding of *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.), *cert. denied*, 522 U.S. 833 (1997), which held, over a decade ago, that it owed "no deference to the district court in reviewing an IAC claim. Not only did the Fourth Circuit fail to correct the error, the erroneous holding was followed in *U.S. v. DeTemple*, 162 F.3d 279 (4th Cir. 1998).

Finally, the underlying issue here, IAC, is not a new or novel issue on which this Court may wish to see the legal analysis develop before stepping in to settle the debate. Rather, this is an area where the law was clear and the courts of appeals are now muddying those waters. Once begun, the confusion and split will only grow and become worse, resulting in the unfair application of different standards upon defendants depending upon which circuit, and perhaps which panel within the circuit, decides the case. Now is the appropriate time to intervene to settle the confusion.

III. THE CIRCUITS ARE IN DISARRAY OVER THE APPROPRIATE STANDARD OF REVIEW TO APPLY TO A CLAIM OF IAC IN THE CONTEXT OF A RULE 33 MOTION

The disarray and confusion among the circuits is even greater than a single split. As noted in the Petition for Certiorari, there are courts of appeals that apply a straightforward *Strickland* bifurcated standard of review; courts that apply an independent, plenary review without reviewing factual findings for clear error; and some courts which apply a "*Strickland* light" standard of review, recognizing the unique and peculiar position of the district court in ruling on an IAC claim in the context of a Rule 33 motion. See, Pet., 16-20. Still other courts apply the abuse of discretion standard applicable to Rule 33 motions to IAC claims brought within the context of a motion for new trial.

In addition to the three different standard of reviews discussed in the Petition for Certiorari, other courts have employed an abuse of discretion standard of review. In *U.S. v. Adam*, 70 F.3d 776, 779 (4th Cir. 1995), the Fourth Circuit reviewed the claim of IAC "only for abuse of discretion" because "[a]ppellant's claim of ineffective assistance of counsel was raised in the district court as grounds for a Rule 33 motion for a new trial." *Ibid.* Ultimately, the *Adam* Court held "we find that the district court's denial of Appellant's Rule 33 motion for a new trial did not constitute an abuse of discretion." *Id.* at 780. Similarly, in *U.S. v. Guang*, 511 F.3d 110, 119 (2nd Cir. 2007), the Second Circuit applied the abuse of discretion standard of

review to a lower court's ruling on a claim of IAC in a Rule 33 motion. While the *Guang* Court also recited the *Strickland* bifurcated standard of review, it ultimately held that "the district court's denial of their motions for a new trial was not an abuse of discretion." *Id.*

Other cases incorrectly cite the standard of review as a simple, one-dimensional de novo, plenary or independent review, failing to recognize the requirement that factual findings be reviewed for clear error. See, e.g., *Hess v. Mazurkiewicz*, 135 F.3d 905, 907 (3d Cir. 1998) and *U.S. v. Kaufman*, 109 F.3d 186 (3d Cir. 1997).

And, as pointed out by the Sixth Circuit in *Munoz,* there is even disagreement within the circuits that have recognized the trial court's broad discretion under Rule 33 supporting a "*Strickland* light" standard of review. See *U.S. v. Scroggins*, 379 F.3d 233, 256-7 (5th Cir. 2004), *judgment vacated on other grounds,* 543 U.S. 1112 (2005) (holding that the district court can grant new trial even in absence of "legal error" based on its broad power to correct a "manifest injustice"); but see, *U.S. v. Logan*, 861 F.2d 859, 864 (5th Cir. 1988) (rejecting the argument that a more lenient *Strickland* analysis should be utilized when the district court considers a motion for new trial due to IAC).

The First Circuit discussed its confusion over the standard of review announced in *Strickland* in *U.S. v. McGill*, 11 F.3d 223, 226, footnote 2 (1st Cir. 1993).

The *McGill* Court first cited its previous standard of review of district court findings of fact, i.e. the "clearly erroneous" standard, wondering whether this standard survived *Strickland*. After noting that *Strickland* may mean, "while the district court's underlying findings of fact are reviewed only for clear error, its ultimate legal conclusions may be reviewed more or less strictly according to the degree that they are fact-dominated," the *McGill* Court decided to leave "this vexing question for another day." *Id.*

The bottom line is that several different standards of review are being implemented by the courts of appeals when reviewing IAC claims, especially when such claims are brought in a motion for new trial pursuant to Rule 33. This Court should step in to settle the law on the appropriate standard of review applicable to IAC claims brought in the context of a Rule 33 motion and thereby ensure the various circuit courts of appeals are all applying the same, correct standard of review.

IV. THE FACTUAL FINDINGS, UPON WHICH A PREJUDICE DETERMINATION IS BASED, SHOULD ONLY BE REVERSED IF CLEARLY ERRONEOUS.

While the determination of prejudice is a mixed question of fact and law (reviewed de novo), the factual findings which underlie the lower court's prejudice determination are reviewed for clear error. *Strickland*, at 698.

Findings regarding the credibility of witnesses are the paradigmatic example of "factual findings". Indeed, Rule 52(a), cited in *Strickland* for the standard applicable to findings of fact, states that "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." See also, *Anderson v. City of Bessemer*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511 (1985) ("even greater deference" required when findings include assessments of credibility); *First Interstate Bank v. United States*, 61 F.3d 876, 882 (Fed. Cir. 1995) (absent extrinsic evidence, a finding based on credibility of one witness over another "can virtually never be clear error"); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 957-58 (9th Cir. 2006) ("The district court's credibility determinations are entitled to special deference").

Here is where the SG confuses the issue, claiming that the district court "was not permitted to make such 'determinations' in the first place, because the district court may not act as a 'thirteenth juror' in the context of an ineffective-assistance claim." Response, 12. Even if the trial judge does not sit as a "thirteenth juror," he or she must make factual findings on a Rule 33 motion for new trial. Indeed, the judge ruling on a claim of IAC is required to make a series of factual findings, including credibility findings and whether or not the case is close. *Strickland*, at 695-696.

Specifically, *Strickland* requires the court hearing an IAC claim to review the entire record, determining whether the case was close or whether the conviction is supported by "overwhelming evidence".

The court is further required to find whether and to what extent the errors of counsel impacted particular factual findings. Such a determination necessarily requires the judge to act as a "thirteenth juror," judging whether the "decision reached would reasonably likely have been different absent the errors." *Strickland*, at 696.

Moreover, contrary to the SG's response and the Sixth Circuit's ruling, the cases have uniformly upheld the district court's authority to make credibility and weight determinations when ruling on a motion for new trial, whether or not that motion is based on a claim that the verdict was against the weight of the evidence. See, *U.S. v. Wall,* 389 F.3d 457, 466-67 (5th Cir. 2004) ("The 'interest of justice' may be based on the trial judge's evaluation of witnesses and weighing of the evidence") citing, *U.S. v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997) (the standard of review of a district court's decision to grant or deny a motion for new trial is necessarily deferential to the trial court because the appellate court has only read the record and, unlike the trial court, did not see the impact of the witnesses on the jury or observe the demeanor of witnesses); *U.S. v. Scroggins*, 379 F.3d 233, 240 (5th Cir. 2004) (holding that the trial judge "may weigh the evidence and may assess the credibility of the witnesses" when ruling on a motion for new trial based on interference with defense witnesses); *U.S. v. Webster*, 960 F.2d 1301, 1305 (5th Cir. 1992) (holding that "[d]eterminations of credibility fall clearly within the peculiar competence of the district

court" when reviewing the district court's ruling on a motion for new trial due to jury misconduct); *U.S. v. Vasquez-Garcia*, 340 F.3d 632, 641 (8th Cir. 2003) (deferring to the district court's credibility determination in the context of a motion for new trial due to newly discovered evidence); see also, *U.S. v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005) (in the context of reviewing a ruling on a suppression motion, "appellate courts defer to district court's findings when they are based on credibility because credibility can *only* be determined by the district court, which is in a position to observe witnesses").

One commentator has outlined the procedure the district court should follow when ruling on a Rule 33 motion for new trial due to newly discovered evidence (which is analogous to an IAC claim):

> If the newly discovered evidence motion requires a credibility choice, as it usually does, the trial court acts as a factfinder weighing not only the new evidence but also the knowledge gained at the original trial.
>
> The standard of appellate review over the trial court's grant or denial of a motion for new trial on any grounds is a highly deferential *abuse of discretion* review. Factfindings usually are not reviewable in the absence of total lack of support for the factfinding in the evidence, particularly when based on credibility choices by the trial court.

Knibb, *Federal Court of Appeals Manual* at § 11.38. The procedure outlined by Knibb is the procedure

followed by the district court in this case yet derided by the Sixth Circuit: "the trial court acts as a factfinder weighing not only the new evidence but also the knowledge gained at the original trial." *Id.* To the extent that this requires the trial judge to act as a "thirteenth juror," the Sixth Circuit (and the SG) are clearly wrong in their aspersions cast on the district court's decision-making.

Here, the district court did exactly what it was required to do. First, the judge relied on his initial factual finding, made when ruling on the Rule 29 motion to acquit, that the case boiled down to a credibility contest. Pet. App., 54-55. Then, the district court examined how the errors of trial counsel in failing to investigate and present extrinsic evidence of credibility impacted the outcome. Pet. App., 72-75. Had the court of appeals given deference to the credibility and factual findings of the district court, particularly the finding that the case boiled down to a credibility battle between Munoz and Tagaban, then it is clear that "but for counsel's unprofessional" failure to investigate and call additional witnesses who could impeach Tagaban and/or corroborate Munoz, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694, 104 S.Ct. 2052.

CONCLUSION

The circuit courts are in disarray over the standard of review for IAC claims raised in the context of a Rule 33 motion for new trial, employing as many as four different standards of review. This Court should step into the fray now and settle the ongoing and growing confusion over the appropriate standard of review for IAC claims raised in a Rule 33 motion for new trial. To ensure uniformity among the circuits on this critical constitutional issue, this Court should grant certiorari.

Respectfully submitted,

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